

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR MARION COUNTY, FLORIDA

MICHELLE MARTIN KING, individually, and
A. SCOTT TONEY, as next friend of RK1,
a minor, and RK2, a minor,

Plaintiffs,

vs.

FLORIDA DEPARTMENT OF CHILDREN
AND FAMILIES, et al,

CASE NO.: 2010-3780-CA-G

2015 JAN 16 PM 4:40
DAVID R. ELLSPERMAN
CLERK CIRCUIT COURT
MARION COUNTY FL

FILED
CIVIL DIVISION

**ORDER DENYING DEFENDANT THERESA SOFKY'S MOTION FOR
SUMMARY JUDGMENT**

This cause came to be heard on Defendant, THERESA SOFSKY'S
Motion for Summary Judgment as to Count VI of the Plaintiff's Second
Amended Complaint on Qualified Immunity grounds. The court after
considering all of the extensive briefs of the parties and arguments of
counsel finds that the Motion should be denied.

FACTS

The Plaintiff's RK1 and RK2, twins, were born in 2001 with some
special needs such as speech delays and heart problems. On June 12,
2006 in Hernando County, Florida, the minor children were taken into
the custody of the Department of Children and Families (DCF) after
allegations of abuse or neglect against the Mother, co-plaintiff, Michele
Martin (King). After being removed the children were placed in a
foster home belonging to Gloria Smith, in Marion County, Florida. This
foster home had previously lost its license because of confirmed sexual

abuse by the foster parent's natural child. Defendant, Amy Ranger, was the assigned family case manager and Defendant, Kimberly Scott was Ranger's supervisor, from Pinellas County. Defendant, Theresa Sofsky, was a child protective investigator. Sofsky, received a complaint from the DCF hotline on or about October 18, 2006, regarding RK1 and RK2 being neglected and abused while in DCF custody in a foster home owned by Gloria Smith. Within 12 hours two more abuse and neglect reports were received by the DCF hotline. On October 26, 2015, a fourth report of abuse and neglect was received through the DCF Hotline See, pages 3 and 4 of Plaintiff's September 16, 2014 response.

The court has read the Motion for Summary Judgment filed by Sofsky on August 19, 2014, the Memorandum of Law filed on the same date. Plaintiff's Response and Memorandum of Law to Sofsky's Motion filed September 16, 2014. The Defendant, Sofsky, failed to file or specify any documents pointing out what facts that Sofsky relied on in support of her motion. After the Plaintiff responded to Sofsky's Motion, Sofsky untimely filed a Statement of Facts on September 17, 2014, two days before the hearing on the motion, pointing to five witnesses that Sofsky listed to support her argument that she is entitled to Qualified Immunity. The Plaintiffs filed a Motion to Strike the Defendant's late filed statement of facts on September 17, 2014 for

the untimely filing of record evidence Sofsky relied upon. The Motion was denied on September 24, 2014 and the hearing on the Motion for Summary Judgment was continued. The Plaintiff filed a response to the defendant's Statement of Facts on October 8, 2014.

FACTS

The parties have submitted very different arguments on what facts the court should rely upon. The court finds that Defendant, Sofsky, received the first three DCF hotline reports of neglect and abuse of the two minor children RK1 and RK2 on October 18, 2014. Sofsky first spoke with Co-Defendant, Amy Ranger, who informed Sofsky that the mother of the two children, Michelle Martin, was causing problems with her investigation, that the Mother had filed a Governor's complaint against her and that she was trying to have the Mother's parental rights terminated. After that, Sofsky, did interview a four people, but did not interview the main care providers, Guardian Ad Litem, the Mother who filed all of the abuse and neglect reports and witnesses who were complaining about the neglect and abuse the children were being subjected to while in the foster care of Gloria Smith. Sofsky, never went to the Smith home to observe the children in the home. There is a long list of failure to investigate the complaints by Sofsky outlined by the Plaintiff's in their response. Plaintiff points out that the hotline complaints are institutional abuse reports that

require a heightened level of investigation and mandatory reporting to law enforcement and the State Attorney. Sofsky, failed to do any of the protocols. There is also evidence that Sofsky, never contacted the Mother of the alleged abused and neglected children, after the Mother left multiple phone messages for Sofkey to call her. According to Plaintiff's evidence, Sofky, failed to follow DCF protocol and guidelines, failed to follow the directions of her own supervisor and the Florida Administrative Code to process these neglect and abuse complaints.

After the kids were placed in the Smith foster home, many complaints were made to Ranger, Scott and Sofsky, that the children were being abused and neglected in Gloria Smith's foster home, that the foster home had more children than it was licensed for and that there was a previous license revocation of this foster home for confirmed abuse complaints and that licensing issues were still outstanding.

The children were having bowel movements in their pants, not doing well in school, were held back the year in foster care, and had not seen a doctor, even though both children had health problems and were special needs children with speech delay. Smith, the foster home parent, would not allow unannounced visits in the foster home that are required under the Florida Administrative Code. Smith's home was licensed for two children when it had five foster children plus three of

Smith's own children. Smith had a history of licensing issues, with her license being previously revoked for abuse complaints and not allowing case workers, guardians and licensing employees in her home. Smith had multiple jobs and left the children in the care of her elderly mother. Smith's mother was not approved as a caregiver. Sofsky on reviewing the hotline complaints, was responsible for making sure the issues were investigated and she personally was responsible to go to the home unannounced, but never did. The licensing issue was never addressed by Sofsky. Mary Stone the courtesy Guardian ad Litem filed the licensing complaint herself. Plaintiff found lice and or lice eggs in the children's hair on August 31, 2006, which was confirmed by a visitation center worker. Some of the witnesses stated they never saw lice, but it was confirmed that at least one of the children from the Smith foster home did have lice and all of the children had to be treated. Plaintiff, Guardian ad litem, and workers at the visitation center had concern for the children's condition being filthy not being washed for several days, wearing dirty clothes, lice and bad odors. Plaintiff on one occasion found the children filthy with dirt in the hair and ears. Their clothes were filthy and looked like they had been worn for several days. Their socks were black and dirt was caked between their toes. No one was clipping their nails which were dirty. Plaintiff filed with the DCF hotline about the situation four times. Sofsky, in

response never talked to the Mother or saw the children in the foster home.

There were also allegations that the children were not being fed, left unattended, not allowed water and this also was not responded to by Sofskiy. In October of 2006, the Plaintiff found the children at the visitation center with some minor injuries, again filthy dirty, circles under their eyes and appeared to be deteriorating more on each visit. Plaintiff Martin, filed a hotline complaints four times. Sofsky, did not investigate the foster home or meet with the children and never talked to the Mother who filed the complaints.

STANDARD OF REVIEW

When a defendant moves for **summary judgment**, the trial court's function is to determine whether the moving party proved the nonexistence of a genuine issue of material fact. Le v. Lighthouse Assocs., Inc., 57 So.3d 283, 285 (Fla. 4th DCA 2011). "If the record reflects even the possibility of a material issue of fact, or if different inferences can reasonably be drawn from the facts, the doubt must be resolved against the moving party." Lindsey, 50 So.3d at 1206 (quoting Bender v. CareGivers of Am., Inc., 42 So.3d 893, 894 (Fla. 4th DCA 2010)). **Summary judgment** is proper only where the facts are "so crystallized that nothing remains but questions of law." Tolan v. Coviello, 50 So.3d 73, 74 (Fla. 4th DCA

2010) (quoting Cohen v. Cooper, 20 So.3d 453, 455 (Fla. 4th DCA 2009))

Analysis

A. Qualified Immunity

Qualified Immunity motions are usually heard at the beginning of the litigation by a Motion to Dismiss and not Summary Judgment on the eve of trial as in this case. Qualified Immunity, protects government actors performing discretionary functions from being sued in their individual capacities. *Lassiter v. Alabama A & M Univ., Bd. of Trustees*, 28 F.3d 1146, 1149 (11th Cir.1994). Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)). The privilege is an immunity from suit rather than simply a defense to liability. *Saucier*, 533 U.S. 194, 121 S.Ct. at 2156. The doctrine shields a government official's conduct from liability where the conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); see also *Tindal v. Montgomery County Comm'n*, 32 F.3d 1535, 1539 (11th Cir.1994) (stating that the two prong test focuses courts on analyzing whether defendant's conduct

violated a clearly established constitutional right and whether a reasonable government official would have been aware of that fact). A court must undergo a two-step process to determine whether qualified immunity protection will be available to the defendant. The first step is to evaluate whether a constitutional right has been violated. The court finds that RK1 and RK2 had a constitutional right to be safe in their placement under Department of Children and Families control and supervision. *Taylor v. Ledbetter*, 818 F.2d 791(11th Cir.1987)

See, *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) (holding qualified immunity protects all but the plainly incompetent or those who knowingly violate the law).

B. Violation of a Clearly Established Constitutional Right

The constitutional right implicated according to Plaintiffs is the fundamental right of physical safety violated by the physical and emotional abuse at the hands of the Gloria Smith, foster parent. The Eleventh Circuit, in *Taylor v. Ledbetter*, 818 F.2d 791(11th Cir.1987), a case involving a suit by a foster child against the state and county officials involved in her placement in a foster home, determined that one committed to the custody of the state involuntarily has a liberty interest in the safety of her environment that was grounded in the historic liberty interest protected substantively by the due process

clause. *Id.* at 795 (citing *Youngberg v. Romeo*, 457 U.S. 307, 315, 102 S.Ct. 2452, 2458, 73 L.Ed.2d 28 (1982)). The *Taylor* court stated, "The liberty interests in this case are the right to be free from the infliction of unnecessary pain, as that interest is protected by the fifth and fourteenth amendments, and the fundamental right to physical safety as protected by the fourteenth amendment.

2. Pre-existing Case Law: *Taylor*

As *Taylor v. Ledbetter*, 818 F.2d 791(11th Cir.1987), was clearly decided before the events that arose in this case, it serves as a sufficient basis to put the Defendant, Sofsky on notice. *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 2156-57, 150 L.Ed.2d 272 (2001). The plaintiffs in *Taylor* suffered "severe and permanent personal injuries as a result of being 'willfully struck, shaken, thrown down, beaten and otherwise severely abused by the foster mother.'" *Taylor*, 818 F.2d at 792. In *Taylor*, where the Eleventh Circuit determined the foster care officials were not entitled to qualified immunity protection, the allegations against the officials included that they, "(1) failed to thoroughly investigate the fitness of the foster home; (2) knew or should have known the foster parents were unfit to be trusted with her care, custody, and supervision; (3) failed to maintain proper supervision in inspection of the foster home; and (4) failed to obtain complete physical and medical records, or to furnish

available records to the foster parents." *Id.* at 793. The allegations are similar here involving RK1 and RK2. Taylor, *supra*, held, "Children in foster homes, unlike children in public schools, are isolated; no persons outside the home setting are present to witness and report mistreatment. The children are helpless. Without the *investigation, supervision, and constant contact required by statute*, a child placed in a foster home is at the mercy of the foster parents." *Id.* at 797 (emphasis added).

If this was not a directive clear enough to put those who work in the foster care system on notice that their duties are ignored at their peril, the *Taylor* court endorsed the decision of the Second Circuit in *Doe v. New York City Dept. of Social Services*, 649 F.2d 134 (2d Cir.1981) stating:

The Second Circuit held that government officials may be liable under section 1983 not only for overt activity which is unlawful and harmful, but also for failure to act when the duty to act exists. "When individuals are placed in custody or under the care of the government, their governmental custodians are sometimes charged with affirmative duties, the nonfeasance of which may violate the Constitution. Thus, nonperformance of such custodial duties has been held to give rise to a section 1983 cause of action for prisoners." *Doe*, 649 F.2d at 141.

See also, *Omar v. Lindsey*, 334 F.2d 1246 (11th Cir. 2003), where the court found that pre-existing case law does not have to be exact.

D. Deliberate Indifference

Where there is a clearly established right, it is the role of courts to determine whether the individuals acted with deliberate indifference to those duties delineated through prior case law. The components of deliberate indifference as expressed by the Eleventh Circuit are (1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than mere negligence. *McElligott v. Foley*, 182 F.3d 1248, 1255 (11th Cir.1999). The question becomes what the Defendant's knew and what action or inaction resulted as well as what obligation they had under statute. The Plaintiffs' have put forward sufficient facts at this stage of the litigation that Defendant, Sofsky, was made aware of the neglect and abuse allegations against the Gloria Smith foster home. Three DCF hotline complaints were received within 24 hours on October 18, 2015 and one on October 26, 2015. After receiving the complaints, that Sofsky, had a duty to protect the minor children and that she was deliberately indifferent to the rights of the minor children or that she was plainly incompetent. The evidence presented by the Plaintiffs shows that Sofsky, never contacted the Mother-complainant or went to the foster home to

observe the children. See also, John J. by and through his next friend, Mary Miller v. Adams, 2002 WL 31986855 (M.D. Fla. 2002), a foster home case where the District Court found that Qualified Immunity did not apply to Defendants for failing to act. The court also found that there was a clearly established constitutional right putting Defendants on notice, relying on Taylor v. Ledbetter, 818 F.2d 791 (11th Cir. 1987). The Plaintiff cites the following in support of their argument.

The Florida Administrative Code provides as follows:

65C-29.003. Child Protective Investigations.

Currentness

(1) Responding to Reports.

(a) The child protective investigator supervisor may downgrade an immediate response to a 24-hour response only if the local investigative unit has obtained additional information from the reporter or law enforcement subsequent to the information collected by the Florida Abuse Hotline that indicates the child is no longer in imminent danger of being harmed. The rationale for this determination shall be approved by the supervisor and documented in the Florida Safe Families Network (FSFN).

(b) When a report is received on a child who is a resident of Florida and the alleged maltreatment occurred in Florida, but the child is temporarily out of state, the investigation shall be commenced by contacting the child welfare agency responsible for child abuse or neglect investigations in the state where the child is temporarily located. The purpose of the contact is to request a timely face-to-face interview with the child in order to ascertain his or her safety, and to determine when the child is expected to return to Florida.

(c) In instances where the Florida Abuse Hotline accepts an abuse report but the child protective investigator subsequently determines through obtaining additional information that the allegations or facts do not meet the criteria for an investigation, the report shall be closed as "No Jurisdiction," after review and approval by the child protective investigator supervisor.

(2) Investigative Requirements. For every report received, the following actions shall be completed:

(a) A determination shall be made as to whether the reporter should be contacted to obtain additional information on the child or family or to clarify information obtained by the Florida Abuse Hotline.

(b) Information shall be collected describing the physical, developmental and behavioral characteristics and overall functioning of the children in the home and

documented in the case record. While interviewing and visually observing the child, the child protective investigator shall be sensitive to issues arising from a child's age and developmental stage, ethnicity, and gender.

(c) Information shall be collected on the parent's or caregiver's overall functioning, parenting style and disciplinary and behavior management practices and documented in the case record. Any person alleged to have maltreated a child shall be interviewed.

(d) If during the course of the investigation it is determined that there is a need to remove physical evidence from the home, other than taking a child into protective custody, the investigator shall request local law enforcement to initiate a criminal investigation.

(e) Abuse history and criminal records checks shall be requested by the child protective investigator on all adult household members not screened by the Florida Abuse Hotline at the time the report was accepted. The criminal records check shall be initiated within 24 hours of the individual's identity and presence in the home becoming known to the investigator. Records checks shall also be completed on any adult visitor to the home who provides care or supervision of the child outside the parent's immediate presence while visiting the home. If the family has lived in another state within the past five (5) years, the child protective investigator shall contact the appropriate law enforcement and child protection agencies in the state where the family resided and request a criminal, including local, and abuse history check on all subjects and household members of the report.

See also: 65C-29.004

Florida Stat. 39.302. Protective investigations of institutional child abuse, abandonment, or neglect

Currentness

(1) The department shall conduct a child protective investigation of each report of institutional child abuse, abandonment, or neglect. Upon receipt of a report that alleges that an employee or agent of the department, or any other entity or person covered by s. 39.01(32) or (47), acting in an official capacity, has committed an act of child abuse, abandonment, or neglect, the department shall initiate a child protective investigation within the timeframe established under s. 39.201(5) and notify the appropriate state attorney, law enforcement agency, and licensing agency, which shall immediately conduct a joint investigation, unless independent investigations are more feasible. When conducting investigations or having face-to-face interviews with the child, investigation visits shall be unannounced unless it is determined by the department or its agent that unannounced visits threaten the safety of the child. If a facility is exempt from licensing, the department shall inform the owner or operator of the facility of the report. Each agency conducting a joint investigation is entitled to full access to the information gathered by the department in the course of the investigation. A protective investigation must include an interview with the child's parent or legal

guardian. The department shall make a full written report to the state attorney within 3 working days after making the oral report. A criminal investigation shall be coordinated, whenever possible, with the child protective investigation of the department. Any interested person who has information regarding the offenses described in this subsection may forward a statement to the state attorney as to whether prosecution is warranted and appropriate. Within 15 days after the completion of the investigation, the state attorney shall report the findings to the department and shall include in the report a determination of whether or not prosecution is justified and appropriate in view of the circumstances of the specific case.

In this case, the Defendant, Sofsky, did not comply with the above Administrative Codes and/or Florida Statutes. Plaintiffs have put forth evidence that Sofsky, never saw the children in the Smith foster home and never talked with the Mother who reported the abuse and neglect. There is evidence that Sofsky intentionally refused to talk to the Mother who reported the abuse and neglect. Sofsky saw the children getting off a school bus on one occasion the day after the first hotline report and one at the end of the case when the children were returned to the Mother. There is no evidence that Sofsky, notified the State Attorney, Law Enforcement and licensing as required by the Administrative Code, regarding the complaints against Smith foster home.

The Court finds that the Defendant, Sofsky is not entitled to Qualified Immunity, Summary Judgment is **DENIED**.

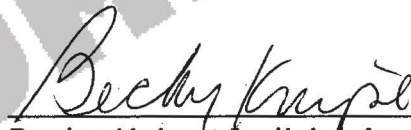
DONE AND ORDERED in Chambers at Ocala, Marion County, Florida on this the 15th January, 2015.

A handwritten signature in black ink, appearing to read "Edward L. Scott", is written over a horizontal line.

EDWARD L. SCOTT
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by hand delivery or by U.S. Mail to ROBERT B. BUCHANAN, ESQ., Siboni, Buchanan & McLean, PLLC, rbuchanan@sbtrial-law.com and apery@sbtrial-law.com; ANDREW S. BOLIN, ESQ., Beytin, McLaughlin, McLaughlin, O'Hara & Bolin, P.A., Amy Ranger, Kimberly Scott, and BayCare Behavioral Health, asb@law-fla.com; mgr@law-fla.com; and rmd@bmmbw.com; and J. RAY POOLE, ESQ., AND GEORGE W. LINEBERRY, ESQ., Constangy, Brooks & Smith, LLC, rpoole@constangy.com; glineberry@constangy.com and jacksonville@constangy.com; GLORIA W. FLETCHER, ESQ., 4510 N.W. 6th Place, Third Floor, Gainesville, FL 32607 gloria@gloriafletcherpa.com; lisa@gloriafletcherpa.com and to JOEL S. FASS, ESQ., Colodney, Fass, Talenfeld, Karlinsky, Abate & Webb, P.A., One Financial Plaza, 23rd Floor, 100 SE Third Avenue, Ft. Lauderdale, FL 33394 jfass@cftlaw.com; sschmerling@cftlaw.com; sgilbert@cftlaw.com on this the 15 day of January, 2015.


Becky Knipe, Judicial Assistant